Supreme Court, U.S.
FILED
95-791 NOV 17 1995
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No. _____

In The

Supreme Court of the United States

October Term, 1995

ALVIA E. HESTER, SR. and
BRENDA HESTER, Individually and
BRENDA HESTER as Executrix of the
Estate of ALVINA E. HESTER, JR., Deceased

Plaintiffs/Petitioners,

versus

CSX TRANSPORTATION, INC.

Defendant/Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK D. LUMPKIN
PAUL S. MINOR
MINOR & ASSOCIATES
Post Office Drawer 1388
Biloxi, MS 39533
(601) 374-5151

WILLIAM S. GUY
Post Office Box 509
McComb, MS 39648-0509
(601) 684-2793

Attorneys for Plaintiffs/
Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

A. Whether the United States Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decision rendered by the United States Court of Appeals for the Seventh Circuit in the case *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994)?

B. Whether the United States Court of Appeals for the Fifth Circuit's interpretation of and reliance upon *CSX Transportation, Inc. v. Easterwood*, 507 U.S. ___, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993) is misguided and misplaced?

C. Whether the United States Court of Appeals for the Fifth Circuit's preemption of the Petitioners' state law claims based upon inadequate crossing protection constitutes error?

D. Whether the United States Court of Appeals for the Fifth Circuit's determination that the Secretary of Transportation determined that the safety devices installed at the crossing were adequate constitutes error?

LIST OF PARTIES

1. Alvia E. Hester, Sr., Plaintiff/Petitioner
2. Brenda Hester, Plaintiff/Petitioner
3. Mark D. Lumpkin, Counsel for Petitioner
4. Paul S. Minor, Counsel for Petitioner
5. William S. Guy, Counsel for Petitioner
6. CSX Transportation, Inc., Respondent
7. Raymond L. Brown, Counsel for Respondent
8. Patrick Buchanan, Counsel for Respondent
9. W. Mark Watts, Counsel for Respondent

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REFERENCES TO OFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The United States Court of Appeals for the Fifth Circuit rendered an opinion in this case which is pertinent to review of the issues presented by this Petition for Writ of Certiorari. This opinion was reported as follows: *Hester v. CSX Transportation, Inc.*, ___ F.3d ___ (5th Cir. 1995). The Hester decision is in conflict with the decision rendered by the United States Court of Appeals for the Seventh Circuit on the same matter in the case of *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994).

STATEMENT OF GROUNDS UPON WHICH JURISDICTION OF THE UNITED STATES SUPREME COURT IS BEING INVOKED

The decree sought to be reviewed is a judgment of the United States Court of Appeals for the Fifth Circuit dated August 21, 1995, and contained in that certain opinion styled *Hester v. CSX Transportation, Inc.*, bearing No. 94-60506.

It is submitted that this case is within the discretionary jurisdiction of this court pursuant to 28 U.S.C. § 1254. This discretion should be exercised in this case based upon the hopeless conflict existing among the Circuit Courts of Appeal concerning preemption of state law claims based on inadequate signalization at railroad crossings.

STATUTES INVOLVED IN THIS CASE

23 C.F.R. § 646.214 Design.

(a) General. (1) Facilities that are the responsibility of the railroad for maintenance and operation shall conform to the specifications and design standards used by the railroad in its normal practice, subject to approval by the State highway agency and FHWA.

(2) Facilities that are the responsibility of the highway agency for maintenance and operation shall conform to the specifications and design standards and guides used by the highway agency in its normal practice, subject to approval by FHWA.

(b) Grade crossing improvements. (1) All traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards.

(2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

(3)(i) Adequate warning devices, under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with

flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school buses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

(c) Grade crossing elimination. All crossings of railroads and highways at grade shall be eliminated where there is full control of access on the

highway (a freeway) regardless of the volume of railroad or highway traffic.

23 U.S.C. § 130 Railway-highway crossings

(a) Except as provided in subsection (d) of section 120 of this title and subsection (b) of this section, the entire cost of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings, may be paid from sums apportioned in accordance with section 104 of this title. In any case when the elimination of the hazards of a railway-highway crossing can be effected by the relocation of a portion of a railway at a cost estimated by the Secretary to be less than the cost of such elimination by one of the methods mentioned in the first sentence of this section, then the entire cost of such relocation project, except as provided in subsection (d) of section 120 of this title and subsection (b) of this section, may be paid from sums apportioned in accordance with section 104 of this title.

(b) The Secretary may classify the various types of projects involved in the elimination of hazards of railway-highway crossings, and may set for each such classification a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction. The percentage so determined shall in no case

exceed 10 per centum. The Secretary shall determine the appropriate classification of each project.

(c) Any railroad involved in a project for the elimination of hazards of railway-highway crossings paid for in whole or in part from sums made available for expenditure under this title, or prior Acts, shall be liable to the United States for the net benefit to the railroad determined under the classification of such project made pursuant to subsection (b) of this section. Such liability to the United States may be discharged by direct payment to the State highway department of the State in which the project is located, in which case such payment shall be credited to the cost of the project. Such payment may consist in whole or in part of materials and labor furnished by the railroad in connection with the construction of such project. If any such railroad fails to discharge such liability within a six-month period after completion of the project, it shall be liable to the United States for its share of the cost, and the Secretary shall request the Attorney General to institute proceedings against such railroad for the recovery of the amount for which it is liable under this subsection. The Attorney General is authorized to bring such proceedings on behalf of the United States, in the appropriate district court of the United States, and the United States shall be entitled in such proceedings to recover such sums as it is considered and adjudged by the court that such railroad is liable for in the premises. Any amounts recovered by the United States under this subsection shall be credited to miscellaneous receipts.

(d) Survey and schedule of projects. – Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

(e) Funds for protective devices. – At least 1/2 of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings. Sums authorized to be appropriated to carry out this section shall be available for obligation in the same manner as funds apportioned under section 104(b)(1) of this title.

(f) Apportionment. – Twenty-five percent of the funds authorized to be appropriated to carry out this section shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(2) of this title, 25 percent of such funds shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(6) of this title, and 50 percent of such funds shall be apportioned to the States in the ratio that total railway-highway crossings in each State bears to the total of such crossings in all States. The Federal share payable on account of any project financed with funds authorized to be appropriated to carry out this section shall be 90 percent of the cost thereof.

(g) Annual report. – Each State shall report to the Secretary not later than December 30 of

each year on the progress being made to implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements. Each State repor shall contain an assessment of the costs of the various treatments employed and subsequent accident experience at improved locations. The Secretary shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives not later than April 1 of each year, on the progress being made by the State in implementing projects to improve railway-highway crossings. The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, nature of treatment, and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (d) and include recommendations for future implementation of the railroad highway crossings program.

(h) Use of funds for matching. – Funds authorized to be appropriated to carry out this section may be used to provide a local government with funds to be used on a matching basis when State funds are available which may only be spent when the local government produces matching funds for the improvement of railway-highway crossings.

45 U.S.C. § 434

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad

> safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

STATEMENT OF THE CASE

On July 22, 1989, Alvia E. Hester, Jr., a 14 year old child, was killed when the car in which he was riding as a guest passenger was struck by a train operated by CSX Transportation, Inc. at the Hatley Circle crossing in Orange Grove, Jackson County, Mississippi. As a result of their son's death, the Hesters filed a wrongful death suit against CSX Transportation, Inc. in Mississippi state court. CSX removed the case to federal court on the basis of diversity of citizenship and then answered the Complaint.

Subsequently, CSX filed a Motion for Partial Summary Judgment asserting that the Hesters' claims against CSX arising from the inadequate warning devices at the Hatley Circle crossing were preempted by the Federal Rail Safety Act of 1970 (FRSA), 45 U.S.C. § 421 et seq. and

the Highway Safety Act of 1973 (HSA), 23 U.S.C. § 130 et seq. CSX's motion was granted and the case proceeded to trial on the remaining theories of negligence. Judgment was entered for CSX on March 25, 1993.

On April 5, 1993, the Hesters filed a Motion for New Trial alleging that the District Court erred in not staying the proceedings until after the Supreme Court's decision in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. ___, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993) had been decided. On April 21, 1993, the *Easterwood* decision was rendered and on June 7, 1993, the District Court granted the Hesters' Motion for New Trial.

CSX filed a Motion for Reconsideration and on June 14, 1994, the District Court entered an order granting CSX's Motion to Reconsider and reinstated the original judgment. The matter was appealed to the United States Court of Appeals for the Fifth Circuit wherein the Fifth Circuit affirmed the District Court's determination that the FRSA preempted the Hesters' state law claims based on inadequate signalization at the Hatley Circle crossing.

Because of the serious and far reaching implications of the Fifth Circuit's decision, and because it is in direct conflict with the decision of the United States Court of Appeals for the Seventh Circuit[1] on the same matter, Petitioners request that this Honorable Court grant review and reverse.

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[1] *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994).

ARGUMENT

Writs should be granted by the Supreme Court in this case because the decision by the United States Court of Appeals for the Fifth Circuit in *Hester v. CSX Transportation, Inc.* is in direct conflict to a decision rendered by the United States Court of Appeals for the Seventh Circuit in *Shots v. CSX Transportation, Inc.* The consequences of the holding by the Fifth Circuit in *Hester* will be far reaching and acts as an impermissible limit upon state law tort claims.

The crossing where Alvia E. Hester, Jr. died, is a single track crossing with high speed train operation and limited sight distance. It is not protected by automatic signaling devices, like flashing lights, cantilevers, bells, gates, or any type of train activated warning device of a sort that warns motorists of approaching trains. The crossing was marked with a passive warning device called a crossbuck, the minimum in railroad crossing protection.

The Fifth Circuit held that because federal funds were, apparently, used to install crossbuck signs at crossings across Mississippi, including Hatley Circle, this "presupposes that the Secretary approved and authorized that expenditure, which in turn legally presupposes that the Secretary determined that the safety devices installed were adequate. . . ."[2]

This holding by the Fifth Circuit is contrary to the express purpose of the FRSA, 45 U.S.C. § 421, which is to

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[2] This is in stark contrast to the Seventh Circuit's holding in *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994).

"reduce death and injuries". It is humbly submitted that the legal presupposition invented by the Fifth Circuit is a sorry surrogate for an actual determination that the warning devices in place are adequate for the danger presented. To enhance safety at railroad crossings, such as Hatley Circle, the federal government has adopted regulations which provide specific criteria and procedures which, if adhered to, *assure* that the level of protection at a specified crossing has been determined to be adequate and approved by the Secretary of Transportation. The minimal crossing protection which was in effect at the Hatley Circle crossing was never determined to be adequate by the Secretary of Transportation and no diagnostic team ever recommended that the level of protection at Hatley Circle was adequate. In a nutshell, because the federal regulatory criteria within the contemplation of 23 C.F.R. § 646.214(b)(3) and (4) was not met at Hatley Circle, the Hesters' commonlaw negligence claims for inadequate crossing protection at Hatley Circle were not preempted by federal law.

The use of Federal funds alone is insufficient to preempt state commonlaw remedies. 45 U.S.C. § 434 specifically allows states to continue any "law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order or standard covering the subject matter of such State requirement." The Secretary of Transportation never prescribed crossbucks nor anything else as adequate protection for the crossing in question. The Secretary was never consulted. Because the Secretary never adopted any standard regarding the Hatley Circle crossing, state common law remedies apply. Mississippi

jurisprudence requires railroads to meet the perils presented by dangerous railroad crossings, by increasing warnings, keeping watchmen, or adopting gates or other safety devices. *New Orleans & Northeastern Rail Co. v. Lewis*, 214 Miss. 163, 58 So.2d 46 (Miss. 1952). Additionally, no diagnostic team justified that gates were not appropriate at the Hatley Circle crossing. See 23 C.F.R. § 646.214(b)(3)(ii). Considering the presumption against preemption and the fact that the criteria of 23 C.F.R. 646.214(b)(3) and (4) were not met at Hatley Circle, there is no preemption and the Mississippi commonlaw negligence scheme applies.

The Fifth Circuit's decision does nothing to maximize crossing safety. Rather, by precluding tort liability for the railroad's failure to have adequate safety devices at this crossing when the Secretary never approved crossbucks nor any other specific warning devices for Hatley Circle, the Fifth Circuit has afforded the railroad industry absolute immunity from civil liability. This encourages recklessness, not accountability.

The imposition of commonlaw negligence remedies enhances the express purpose of the FRSA. "Holding railroads liable under a negligence scheme compliments the statutes 'by encouraging railroad – the entities arguable most familiar with crossing conditions – to provide current and complete information to the state agents responsible for . . . improvement projects.' *Easterwood*, 113 S.Ct. at 7039." *Lusby v. Union Pacific Railroad Co.*, 4 F.3d 639, 642 (8th Cir. 1993).

Specifically, the FRSA allows the states to adopt or continue in force any law, rule, regulation, order or standard, relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such state requirement. 45 U.S.C. § 434. Because the Secretary has not adopted any rule, regulation, order or standard regarding the warning devices at the Hatley Circle crossing, there is no preemption.

Even if federal funds were expended on this crossing, which is denied, there was never any determination that the minimal warning devices which were installed were adequate for this dangerous crossing.[3] In *Hatfield v. Burlington Northern RR.*, 1 F.3d 1071, 1072 (10th Cir. 1993) that Court held that financial assistance must be a significant event. At page 1072, that Court stated:

> Given the Court's reliance upon a presumption against preemption, *Easterwood*, 507 U.S. 16th, 113 S.Ct. 1739, logic dictates that more than a casual financial connection between the federal government and the project has to exist before that project is governed and circumscribed by federal regulation. Thus, we conclude that a degree of federal participation must be significant.

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[3] CSX Transportation, Inc. created an issue of fact for jury determination wherein it conceded that no federal funds were utilized at the Hatley Circle crossing. Even if funds were utilized on this crossing, the funds were certainly not utilized to upgrade crossing protection.

As this Court has recognized previously, only in those situations where warning devices are installed pursuant to 23 C.F.R. § 646.214(b)(3) and (4), will state law be preempted. As this Court stated, these regulations establish requirements that: "certain protective devices be installed or federal approval be obtained." *Easterwood*, 507 U. S. ___, 123 L.Ed.2d at 400, 113 S.Ct. 1739. In this case, neither were accomplished.

In *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994), the U. S. Court of Appeals for the Seventh Circuit aligned itself with the Eighth, Tenth, and Eleventh Circuits[4] in holding that a Plaintiff's claim for inadequate grade crossing protection was not preempted. That Court observed: "The regulation does not specify particular safety devices at a particular crossing. Rather, it establishes the criteria for determining which safety devices are required at particular crossings." In the current case, "the Secretary has never expressed his approval of crossbucks or any other specific warning devices" at Hatley Circle. *Shots*, 38 F.3d at 307. Because the Secretary of Transportation never approved the level of passive protection at Hatley Circle, no federal intervention occurred and the Hesters' state commonlaw claims are viable. The Fifth Circuit erred in affirming the Lower Court and must be reversed.

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[4] See *Lusby v. Union Pacific Rail Co.*, 4 F.3d 639, 642 (8th Cir. 1993); *Hatfield, supra*; *Mahony v. CSX Transportation, Inc.*, 993 F.2d 211 (11th Cir. 1993).

CONCLUSION

In affirming the District Court's decision holding the Plaintiffs' state tort law claims as being preempted, the Fifth Circuit has rendered a decision contrary to the Seventh, Eighth, Tenth, and Eleventh Circuits. Because of the lack of uniformity, a hopeless conflict exists in the Courts of Appeal concerning the issue of preemption regarding state tort claims based on inadequate signalization at railroad crossings.

Because of the importance of the issues presented herein, which have not been, but should be, settled by this Court, Petitioners respectfully request that this Honorable Court grant the Petition for Writ of Certiorari and reverse.

Respectfully submitted this the 16th day of November, 1995.

Alvia E. Hester, et al.,
Plaintiffs/Petitioners

MARK D. LUMPKIN
PAUL S. MINOR
MINOR & ASSOCIATES
Post Office Drawer 1388
Biloxi, MS 39533
(601) 374-5151

and

WILLIAM S. GUY
Post Office Box 509
McComb, MS 39648-0509
(601) 684-2793

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October Term, 1995

ALVIA E. HESTER, SR. and BRENDA HESTER, Individually and BRENDA HESTER as Executrix of the Estate of ALVIA E. HESTER, JR., Deceased

Plaintiffs/Petitioners,

versus

CSX TRANSPORTATION, INC.

Defendant/Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

APPENDIX

Alvia E. HESTER, Sr., and Brenda Hester, Individually and Brenda Hester as the Executor of the Estate of Alvia E. Hester, Jr., Deceased, Plaintiffs-Appellants,

v.

CSX TRANSPORTATION, INC., Defendant-Appellee.

No. 94-60506.

United States Court of Appeals,
Fifth Circuit.

Aug. 21, 1995.

Parents of automobile passenger who was killed in automobile/train collision brought wrongful death action against railroad. The United States District Court for the Southern District of Mississippi, Walter J. Gex, III, J., granted railroad's motion for reconsideration, pursuant to which it reinstated jury verdict in railroad's favor. Plaintiffs appealed. The Court of Appeals, Garwood, Circuit Judge, held that: (1) Federal Rail Safety Act (FRSA) preempted state law claims based on inadequate signalization at crossing, and (2) expert's testimony briefly referencing state's inventory of traffic volume at railroad crossing was harmless.

Affirmed.

Appeal from the United States District Court for the Southern District of Mississippi.

Before REAVLEY, GARWOOD and DAVIS, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiffs-appellants Alvia Hester, Sr. and Brenda Hester (the Hesters) appeal an order of the district court granting defendant-appellee CSX Transportation's (CSX) motion for reconsideration, pursuant to which the district court reinstated the jury verdict in favor of CSX. We affirm.

Facts and Proceedings Below

On July 22, 1989, an automobile in which the Hesters' fourteen-year-old son was a passenger collided with a train operated by CSX at the Hatley Circle crossing in Orange Grove, Jackson County, Mississippi. The Hesters' son was killed in the accident. The Hesters filed a wrongful death suit against CSX in Mississippi state court; CSX removed the case to federal court on the basis of diversity of citizenship and then answered the complaint.

CSX subsequently was granted leave to amend its answer to raise the affirmative defense of federal preemption as to the Hesters' excessive speed and inadequate signalization claims. Thereafter, CSX moved for partial summary judgment as to these aspects of the Hesters' negligence claims. On September 25, 1992, the district court granted CSX's motion, finding that both the excessive speed and inadequate signalization claims were preempted by the Federal Rail Safety Act of 1970 (FRSA), 45 U.S.C. § 421 *et seq.*, and the Highway Safety Act of 1973 (HSA), 23 U.S.C. § 130 *et seq.* Following entry of the district court's order, the Hesters moved for reconsideration and a stay of the proceedings in the case pending the

Supreme Court's resolution of *CSX Transportation, Inc. v. Easterwood*. The district court denied the motion.

The case proceeded to trial on the Hesters' remaining theories of negligence.[1] The jury returned a verdict in favor of CSX, and the district court entered judgment for CSX on March 25, 1993. On April 5, 1993, the Hesters filed a motion for new trial, alleging that the district court erred in not staying proceedings until *Easterwood* had been decided and in admitting certain testimony of CSX's expert witness. On April 21, the Supreme Court issued its decision in *Easterwood*. As discussed more fully below, a crucial issue under *Easterwood* is whether federal funds have "participated" in upgrading the subject crossing; if they have, state law is preempted in certain respects. In a supplemental response to the Hesters' motion for new trial, CSX "conceded that no federal funds were actually used to upgrade the subject crossing." On June 7, 1993, the district court granted the Hesters' motion, determining that, "in the interest of justice, a new trial should be granted."

CSX then filed a motion for reconsideration of the order granting a new trial, asserting that federal funds had in fact been expended in the upgrading of Hatley

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[1] These theories were that the visibility at the crossing was so obstructed by vegetation as to make the crossing ultrahazardous, that the crew failed to keep a proper lookout for approaching motorists, that the train was not blowing its whistle as it approached the crossing, that the crew failed to blow the warning whistle once they spotted the car, and that the crew failed to use reasonable care in timely applying the emergency braking system once they determined that the car was not going to stop.

Circle. The Hesters opposed this motion, and the district court held a hearing on January 27, 1994. Following the hearing, the district court directed the parties to provide further information on whether CSX had participated in diagnostic teams surveying railroad crossings in Mississippi; CSX entered a supplemental filing demonstrating that, contrary to its assertion at the January hearing, it had in fact participated in such diagnostic teams. On June 14, 1994, the district court filed an order determining that CSX had shown that it participated in diagnostic teams to prioritize railroad crossings in Mississippi for improvements and that federal funds were expended in upgrading the Hatley Circle crossing, as required by *Easterwood*. It therefore granted CSX's motion to reconsider and reinstated the original judgment. The Hesters thereafter timely appealed to this Court.

Discussion

On appeal, the Hesters assert that the district court erred in holding that their inadequate signalization claims were preempted by the Supreme Court's decision in *CSX Transportation, Inc. v. Easterwood*, ___ U.S. ___, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993), arguing that CSX has not satisfied the preconditions necessary for preemption under Easterwood. The Hesters also claim error in the district court's admission of certain testimony of CSX's expert witness.

I. Federal Preemption of State Law Claims

In Easterwood, the Supreme Court considered whether the FRSA preempted the plaintiff's Georgia common law negligence claim that the railroad crossing at which her husband was killed had inadequate warning signals.[2] Under the FRSA, a state may "adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard *covering the subject matter* of such State requirement." 45 U.S.C. § 434 (emphasis added). In 1973, Congress enacted the HSA, which

> "makes federal funds available to the States to improve grade crossings, in return for which the States must 'conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require . . . protective devices, and establish and implement a schedule of projects for this purpose." *Easterwood*, ___ U.S. at ___, 113 S.Ct. at 1737 (quoting 23 U.S.C. § 130(d)).

The states' eligibility for and use of federal funds is governed by regulations promulgated by the Federal

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[2] Like the Hesters, the plaintiff in Easterwood also asserted a claim of negligence based on the train's allegedly excessive speed. The Court held that such claims were preempted by the FRSA and attendant implementing regulations. *Easterwood*, ___ U.S. at ___, 113 S.Ct. at 1742-42; *but see id.* at ___, 113 S.Ct. at 1743 n. 15 (refusing to determine whether these regulations bar claims for "related tort law duties, such as the duty to slow or stop a train to avoid a specific, individual hazard"). Accordingly, the Hesters have not brought forward their excessive speed claims.

Highway Administration (FHWA). *See generally* 23 C.F.R. pts. 646, 655, 924, 1204. The issue before the Court in Easterwood was whether these regulations "covered the subject matter" of the plaintiff's state law claims and therefore preempted those claims. *Easterwood*, ___ U.S. at ___, 113 S.Ct. at 1737.

The Court noted that the use of the term "covering" in the FRSA's express preemption clause implied a restrictive view of preemption, under which "pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law," and that the context of the provision, which "is both prefaced and succeeded by express saving clauses," manifested a "considerable solicitude for state law." *Id.* at ___, 113 S.Ct. at 1738. The Court thus held that general regulations that do not establish particular requirements governing the installation of warning devices at grade crossings do not cover the subject matter of state tort law and thus could not have preemptive effect.[3] *Id.* at ___, 113 S.Ct. at 1738-40.

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[3] Specifically, the Court held that the regulations of 23 C.F.R. pt. 924, which require states receiving federal aid to establish highway safety improvement programs and set forth the parameters of such programs, did not preempt state law negligence claims against railroads because they spoke only to the duties of the state with respect to grade crossings. Given that the states and the railroads occupied historically distinct spheres of responsibility with respect to grade crossing safety and "that the regulations provide no affirmative indication of their effect on negligence law," the Court held that these regulations did not preempt state negligence law. *Easterwood*, ___ U.S. at ___, 113 S.Ct. at 1739-40. Likewise, it held that the requirement that states comply with the FHWA's Manual on Uniform Traffic Control Devices for Streets and Highways, *see* 23 C.F.R.

The regulations set forth in 23 C.F.R. § 646.214(b)(3) and (b)(4), however, do prescribe such particular requirements.[4] The Court therefore held that, where applicable, these regulations *do* preempt state law:

> "[U]nder §§ 646.214(b)(3) and (4), a project for the improvement of a grade crossing must either

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§§ 646.214(b)(1), 655.603, did not cover the subject matter of state tort law because the Manual itself stated that it was intended only to establish standards for warning device installations, not legal requirements that devices be installed. *Easterwood*, ___ U.S. at ___, 113 S.Ct. at 1740.

[4] Section 646.214(b)(3) states,

"(i) *Adequate warning devices,* under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sign distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable."

include an automatic gate or receive FHWA approval if federal funds 'participate in the installation of the [warning] devices.' Thus . . . §§ 646.214(b)(3) and (4) displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained. . . . In short, for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which . . . seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings."[5] *Id.* at ___, 113 S.Ct. at 1741 (footnote omitted).

Section 646.214(b)(4) provides,

"For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA."

[5] The Court found, however, that the railroad had not established that federal funds participated in the installation of warning devices at the crossing in question. The evidence showed that, although federal funds had been set aside to install a crossing gate, the project had been stalled when the city refused to approve other necessary improvements. *Easterwood*, ___ U.S. at ___, 113 S.Ct. at 1741. Although preliminary circuitry had been installed, the gate was never erected, and the federal funds were allocated to other uses. *Id.* The Court held that this evidence did not establish that federal funds participated in the installation of warning devices at the crossing; the preliminary circuitry was not a warning device under the definition of the regulations. *Id.* (citing 23 C.F.R. § 646.204(i) & (j)).

Pursuant to Easterwood, the test we thus must apply is whether federal funds "participated" in the installation of "warning devices" at the Hatley Circle crossing. If they have, the Hesters' common law claims based on inadequate signalization are preempted.

CSX presented evidence, including Mississippi Department of Transportation (MDOT) records and the affidavit of Newton McCormick, the Office Engineer of the Construction Division of MDOT, showing that from 1981 to 1983 federal funds were approved *and expended* in the upgrading and installation of reflectorized crossbucks, advance warning signs, and advance pavement warning markings at the Hatley Circle crossing. Such passive warning devices fall within the regulations' definition of devices for which federal funds may be expended.[6] *See* 23 C.F.R. § 646.204(i). Having reviewed

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[6] Of course, passive warning devices are not adequate where section 646.214(b)(3) applies, but it seems clear on the facts before us that the applicable provision is section 646.214(b)(4). The Hesters conceded in a supplemental response to CSX's motion for reconsideration that Hatley Circle was a rural crossing and that therefore subsections (A) through (E) of section 646.214(b)(3)(i) were not applicable. In addition, although CSX has adequately demonstrated that it participated in diagnostic teams to study and rank crossings for improvements, there is no record evidence indicating that such a diagnostic team made any recommendations with respect to Hatley Circle. The provisions of section 646.214(b)(3)(i)(F), which contemplates that an automatic gate may be installed if a diagnostic team so recommends, are therefore inapplicable.

Moreover, as our discussion below makes clear, the mere fact that a railroad has participated as a member of a diagnostic team to survey, rate, and rank grade crossings for future improvements is by itself insufficient to establish that federal

the record evidence, we find that CSX has established that federal funds did in fact participate in the installation of warning devices at Hatley Circle.[7]

The Hesters argue that there is no record evidence demonstrating that the Secretary made a determination that these passive warning devices were adequate to protect motorists at Hatley Circle. The statute and regulations preclude this argument. The regulations direct the Secretary to authorize the expenditure of federal funds only on projects that satisfy, *inter alia*, the requirements of

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funds participated in the improvement of the crossing; there must be an actual, authorized expenditure of federal funds in the installation or placement of safety devices at the particular crossing to trigger preemption. *See, e.g., St. Louis Southwestern Railway Co. v. Malone Freight Lines, Inc.*, 39 F.3d 864, 866-67 (8th Cir.1994) (participation occurs only when safety devices are actually installed, not when federal funds are merely earmarked for improvements), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1963, 131 L.Ed.2d 854 (1995); *Bowman v. Norfolk Southern Railway Co.*, 832 F.Supp. 1014, 1019 (D.S.C.1993) (finding no preemption when defendant proved only that crossing had been inspected pursuant to federal program). *But see Hatfield v. Burlington Northern Railroad Co.*, 1 F.3d 1071, 1072 (10th Cir.1993) (participation must be a "significant event," although actual installation is not necessarily required for preemption).

[7] We cannot agree with the Hesters that CSX's earlier concession that no federal funds participated in the installation of the improvements at Hatley Circle creates a fact issue precluding summary judgment. The documentary evidence clearly demonstrates that federal funds did participate in the installation. There is no contrary evidence. We do not take the Hesters to be arguing that this evidence is fabricated or otherwise fraudulent.

federal law, specifically 23 U.S.C. § 109.[8] *See* 23 C.F.R. § 630.114(b). Under that section, "[n]o funds shall be approved for expenditure . . . unless proper safety protective devices complying with safety standards *determined by the Secretary at that time as being adequate* shall be installed or be in operation at any highway and railroad grade crossing . . . " 23 U.S.C.A. § 109(e) (emphasis added). The fact that federal funds participated in the installation of the warning devices legally presupposes that the Secretary approved and authorized that expenditure, which in turn legally presupposes that the Secretary determined that the safety devices installed were adequate to their task.[9] There is no evidence that this did not in fact happen. Nor is there any evidence demonstrating that passive warning devices alone were deemed inadequate (or were not found adequate) to promote safety at Hatley Circle.

We therefore conclude that federal funds participated in the installation of warning devices at Hatley Circle.

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[8] It is the Secretary's authorization that triggers the participation of federal funds. *See* 23 C.F.R. § 630.114(g) ("Federal funds shall not participate in costs incurred prior to the date of authorization to proceed."). Prior to authorization, the Secretary must approve the proposed project, but such approval "does not constitute an obligation of funds, nor establish a date of eligibility for Federal funding." *Id.* § 630.112(c).

[9] We note that the Seventh Circuit seems to have, at least arguably, reached a contrary conclusion in *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir.1994). We do not know precisely what evidence was before the Shots court nor the full facts of that case. Nevertheless, on the facts before us here, we feel constrained by *Easterwood* to find the Hesters' claims preempted.

The Hesters' state law claims based on inadequate signalization at the crossing are therefore preempted.

II. Expert Witness Testimony

The Hesters also allege error in the admission of certain testimony of CSX's expert witness, Dr. Glenn A. Burdick (Burdick). First, they argue that the district court committed reversible error in allowing Burdick to refer to the findings of a state-sponsored inventory of railroad crossings in Mississippi. Under federal law,

> "[R]eports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of . . . railway-highway crossings . . . shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data." 23 U.S.C. § 409 (footnote omitted).

The Hesters claim that Burdick testified in violation of this prohibition when, while describing his *personal* inventory of the traffic volume at Hatley Circle, he mentioned in passing that the state inventory had determined a slightly greater volume of traffic.

We think it highly doubtful that the district court abused its discretion in admitting this testimony. *See EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1092-93 (5th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1252, 131 L.Ed.2d 133 (1995). The statement was made in the midst of an extended narrative outlining Burdick's personal assessment of the amount of traffic at the crossing. This

clearly distinguishes the present case from *Lusby v. Union Pacific Railroad Co.*, 4 F.3d 639 (8th Cir.1993), in which the court found reversible error when the expert's entire opinion as to the safety of the crossing was based on inadmissible inventory evidence. *Id.* at 641. Even assuming *arguendo* that the testimony was erroneously admitted, this general, isolated, passing reference to the inventory (which did not even mention by whom the inventory had been conducted) was undoubtedly harmless.[10]

The Hesters also argue that the district court erred in allowing Burdick to evaluate a set of pictures that the Hesters had earlier entered into evidence to illustrate visibility at the Hatley Circle crossing. Burdick opined that the pictures were misleading and did not accurately depict the conditions at the crossing. The Hesters contend that this testimony was outside Burdick's designated field of expertise.[11] The admission of expert testimony is

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[10] We note too that the findings of the inventory, which found a slightly greater volume of traffic at the Hatley Circle crossing than Burdick's own inventory indicated, were actually more beneficial to the Hesters' case than CSX's.

[11] The Hesters also contend that the admission of Burdick's opinion was particularly egregious given that it was not disclosed to them until trial, thereby prejudicing their ability to adequately cross-examine Burdick. Fed.R.Civ.P. 26(a)(2)(B) provides for the discovery of facts known and opinions held by expert witnesses to be called at trial. However, if an expert's opinion is to be introduced merely to rebut the opposing party's expert's opinion, parties have thirty days from the date of disclosure of that opinion to supplement their discovery responses. Fed.R.Civ.P. 26(a)(2)(C). Under Fed.R.Civ.P. 26(a)(2)(C), supplementation of Burdick's opinion was due by March 8. Burdick's

a matter committed to the district court's discretion, and we will reverse only if we find manifest error. *Rosado v. Deters*, 5 F.3d 119, 124 (5th Cir.1993).

We conclude that, on balance, the district court did not abuse its discretion in allowing Burdick's testimony in this respect. At the time of his deposition, Burdick had already analyzed and expressed an opinion as to photos of the crossing taken only a day or two after the accident that CSX had provided to him. We do not think, therefore, that the Hesters can claim that they were completely surprised by Burdick's asserted expertise in the general field of photo analysis.[12] Significantly, Burdick had made

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opinion was not in fact disclosed to the Hesters' counsel until the day of Burdick's testimony, March 17.

It is committed to the district court's discretion whether to sanction a party for violations of Rule 26(e)(1) by, for example, excluding expert testimony. *Bradley v. United States*, 866 F.2d 120, 124 (5th Cir.1989). In addition, the district court stated its opinion that it did not believe CSX intentionally withheld Burdick's opinion to gain an unfair advantage. This finding is not clearly erroneous. Also, for the reasons discussed herein, we do not think the district court abused its discretion.

[12] The Hesters point to Burdick's direct testimony that "it would require an expert in photo analysis to identify those [the Hesters' photographs] as being of the crossing," but take the comment completely out of context. The comment was introductory to Burdick's (unobjected to) opinion that the Hesters' photos of the crossing purporting to show that vegetation obstructed motorists' view of approaching trains were misleading. Burdick was not stating that *he* was not properly qualified to analyze the photographs, as the Hesters imply; immediately after making this statement, Burdick explained, "With considerable analysis, I could determine where they were taken from and in what direction the camera was pointing . . . "

a personal, on-site survey of the crossing; even a layperson may testify to the accuracy of a photograph of a scene that he has personally viewed.

Moreover, the Hesters did not object to CSX's at-trial tender of Burdick as "an expert in [the] field of accident reconstruction *with the ability to analyze photographs . . .*" (emphasis added). In addition, when counsel for CSX began to question Burdick about the photographs, counsel for the Hesters allowed his testimony to continue for several pages of transcript before objecting;[13] by that time, Burdick had already opined that the photos were inaccurate and misleading.

Conclusion

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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[13] The Hesters complain that the district court did not allow them to fully state their objection before overruling it. Considering the lateness of this objection, however, we do not think this fact is particularly relevant.

Jason M. SHOTS, Plaintiff-Appellee,

v.

CSX TRANSPORTATION, INCORPORATED, Defendant-Appellant.

No. 94-1290.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 7, 1994.

Decided Oct. 13, 1994.

Motorist who was injured when his automobile collided with train at grade crossing sued railroad for negligence, alleging that it should have made crossing safer by equipping it with automatic gate and flashing-light signals. The United States District Court for the Southern District of Indiana, Gene E. Brooks, J., rejected railroad's preemption defense. Certification of question for interlocutory appeal was accepted. The Court of Appeals, Posner, Chief Judge, held that federal financial assistance in placing reflectorized cross-bucks at intersection in question did not preempt state regulation of crossing safety.

Affirmed.

David V. Scott, New Albany, IN (argued), for Jason M. Shots.

Victor L. Frost, II, Bruce A. Hugon (argued), Frost & Hugon, Indianapolis, IN, for CSX Transp., Inc.

William A. Brasher, Brasher Law Firm, St. Louis, MO, Stephen A. Trimble, Hamilton & Hamilton, Washington,

DC, for Association of American Railroads, amicus curiae.

David W. Stone, IV, Anderson, IN, Daniel J. Harrigan, Bayliff, Harrigan, Cord & Maugans, Kokomo, IN, for Association of Trial Lawyers of America, amicus curiae.

Before POSNER, Chief Judge, and WELLFORD* and EASTERBROOK, Circuit Judges.

POSNER, Circuit Judge.

Jason Shots was injured when the car he was driving collided with a train operated by CSX at a grade crossing in Indiana in 1989. The crossing was equipped only with reflectorized cross-bucks – the familiar warning sign with two crossed arms implanted with plastic disks that reflect a vehicle's headlights at night. Shots brought a diversity tort suit against CSX, charging that the railroad had been negligent in failing to make the crossing safer – to equip it with an automatic gate and flashing-light signals or persuade the state or the municipality to do so. (A railroad grade crossing is the intersection of two rights of way – the railroad's, for the track, and the state or municipality's, for the highway or road that crosses the track – and we do not know which entity has the actual right or responsibility for the warning system.) The railroad interposed the defense that any attempt by the state through its common law or otherwise to regulate safety at this crossing was preempted by the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421 *et seq.*, because the cross-bucks had been installed with federal financial assistance.

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*Hon. Harry W. Wellford of the Sixth Circuit.

The district judge rejected the defense but certified the question for interlocutory appeal under 28 U.S.C. § 1292(b), and we accepted the certification.

No previous case decides whether federal financial assistance alone preempts state regulation of crossing safety. In the wake of *CSX Transportation, Inc. v. Easterwood*, ___ U.S. ___, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993), of which more anon, the Tenth Circuit in two cases has held that the financial assistance must be a "significant event" in some as yet not fully defined sense, Armijo v. Atchison, Topeka & Santa Fe Ry., 19 F.3d 547, 550-51 (10th Cir.1994); see also Hatfield v. Burlington Northern R.R., 1 F.3d 1071 (10th Cir.1993), but the cases do not explore the issues that arise once the threshold of establishing federal financial assistance has been crossed. The novelty of the issue presented by the present case – what if anything more must be shown besides federal financial assistance to knock out a state common law or statutory safety requirement for grade crossings – and its financial importance both to railroads and to tort plaintiffs and their lawyers are shown by the filing of amicus briefs by the American Association of Railroads and the Association of Trial Lawyers of America.

The Federal Railroad Safety Act creates a scheme of comprehensive federal regulation of rail safety, including safety at grade crossings, but allows the states to "adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. We must decide whether the Secretary has "cover[ed] the subject matter"

of Indiana's common law of torts, so far as the absence of automatic gates and flashing-light signals at the crossing where Shots was injured is concerned, by a regulation which provides that "on any project where Federal-aid funds participate in the installation of" warning devices at grade crossings the devices must include "automatic gates with flashing light signals" if any one of a number of specified conditions is present. The conditions include "multiple main line railroad tracks," "a high volume of vehicular traffic," and "a diagnostic team recommends [automatic gates with flashing-light signals]." Even if one or more triggering conditions is present, "if a diagnostic team justifies that gates are not appropriate" the Secretary can waive them. 23 C.F.R. § 646.214(b)(3)(ii). If the requirements in subsection (3) (just quoted) for gates plus flashing lights are not satisfied, "the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of" the Secretary. 23 C.F.R. § 646.214(b)(4). The railroad deems subsection (4) applicable and argues that the Secretary approved, or at least should be deemed to have approved, the reflectorized cross-bucks at the crossing where Shots was injured. If this is right, the state cannot require greater or different precautions at the crossing.

The regulation, although subject to the preemption provision of the Federal Railroad Safety Act of 1970, CSX Transportation, Inc. v. Easterwood, supra, ___ U.S. at ___, 113 S.Ct. at 1737 n. 4, was actually promulgated under the authority of a later statute, the Highway Safety Act of 1973, 23 U.S.C. §§ 101 *et seq.* A follow-on to the Federal

Railroad Safety Act, the Highway Safety Act offered federal money for the installation of grade-crossing safety devices to states that would undertake to identify those crossings that might require such devices and to "establish and implement a schedule of projects for this purpose"; hence the need for the diagnostic teams, ordinarily made up of state and railroad safety engineers, to which the regulation refers. 23 U.S.C. § 130(d).

Pursuant to the Highway Safety Act, the State of Indiana made an agreement with the predecessor of CSX in 1975 to "upgrade the passive protection at the Railroad's public rail-highway crossings in Indiana to minimum standards, as established by the State." The agreement covers 2,638 highway crossings and requires the railroad to install (largely at the expense of the state, which is to say of the federal government) reflectorized cross-bucks at all crossings that do not have them and to replace "nonstandard" with standard reflectorized cross-bucks at other crossings. All the new cross-bucks were to be supplied by the state at no charge to the railroad. The agreement was approved by the Secretary of Transportation only five days after regulation 646.214 went into effect, and without a recommendation by a diagnostic team. The crossing at which Shots was injured was one of the crossings at which, pursuant to the agreement, reflectorized cross-bucks were installed. Since this occurred long before the accident took place, and since federal funds "participated" in the installation, the railroad argues that the regulation clicks in and any argument that it was negligent not to have gates and flashing lights is precluded by the preemption provision in the 1970 Act.

The Supreme Court's opinion in Easterwood cites the regulation and states with reference to it that "for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter." ___ U.S. at ___, 113 S.Ct. at 1741. Read literally, as a blanket statement that the regulation prescribes *the* safety devices for all crossings at which federal funds have been used for the installation of some safety device, this passage supports the railroad's position. But we do not think that the literal reading is the correct one. The regulation does not specify particular safety devices at particular crossings. Rather, it establishes criteria for determining which safety devices are required at particular crossings. Because the Supreme Court in Easterwood found that federal funds had not participated in the project at issue in the case, it had no occasion to consider the application of the regulation to particular crossings. Similarly, in the two Tenth Circuit decisions that we cited, the issue was whether the regulation was applicable by virtue of federal financial participation, not whether the regulation, if applicable, actually prescribed a particular safety device at a particular crossing.

The general thrust of the provision of the Federal Railroad Safety Act on preemption is clear enough. If the Secretary promulgates a regulation that covers the subject matter of some state safety requirement, the state requirement must give way (with an inapplicable exception) even if there is no direct conflict, that is, even if the

federal and state requirements would not place the railroad under conflicting duties. If the state fixes a speed limit of 50 m.p.h. and the Secretary of Transportation a speed limit of 60 m.p.h. the state limit is nullified, even though the railroad could comply with both the state and the federal requirement by not exceeding 50 m.p.h. *Id.* at ___, 113 S.Ct. at 1742-44; see also Watson v. Rail Link, Inc., 826 F.Supp. 487, 490 (S.D.Ga.1993). The Secretary was to have the whip hand in specifying safety standards in the railroad industry; the preemption provision itself refers, in a sentence that we did not quote, to the goal of achieving so far as possible national uniformity in those standards. So if the Secretary had prescribed cross-bucks for the crossing at which Shots was injured, Shots could not argue that the common law of Indiana required the railroad to install automatic gates and flashing-light signals. The regulation would have covered the subject matter of highway safety at that crossing.

The Secretary has not prescribed cross-bucks or anything else at the crossing in question, however, and we do not understand the railroad to be arguing, by analogy to cases like Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 774-75, 67 S.Ct. 1026, 1030-31, 91 L.Ed. 1234 (1947), that the Federal Railroad Safety Act gives federal inaction preemptive effect. There is, of course, the regulation; if it can be read, either by itself or in conjunction with the agreement between the state and the railroad, as prescribing the safety devices for the crossing at which Shots was injured, then the Secretary has covered the relevant subject matter and the railroad has a good defense to Shots's suit. There is – we believe the railroad would agree – no such prescription in the

regulation when it is read apart from the agreement. The regulation, as we said earlier, prescribes criteria for selecting safety devices rather than the devices themselves. Subsection (3) requires gates and flashing lights if any of the conditions specified in that subsection exist, unless a diagnostic team recommends against them and the Secretary concurs. There is no indication whether any of the conditions in subsection (3) has ever been fulfilled at the crossing where Shots was injured. Perhaps one or more has been; if so, and if the railroad was in violation of the regulation when he was hurt, then instead of the railroad's using the regulation defensively Shots should be using it offensively. Well, he isn't trying to use it offensively, so we can dismiss the possibility that subsection (3) required gates at this particular crossing and turn to subsection (4). While that provision would not of its own force require the installation of gates and flashing lights, the type of warning device to be installed would be subject to the Secretary's approval, and the Secretary has never expressed his approval of cross-bucks or of any other specific warning device at this crossing. For all that appears, if consulted he would have insisted on automatic gates and flashing-light signals. He was not consulted, and did not approve cross-bucks – unless he should be deemed to have approved them by approving the 1975 agreement between the railroad and the state.

We do not doubt that the Secretary can approve a warning device before or after its installation or that he can make wholesale as well as retail approvals. We may assume as well that he can act through state safety officials as his delegates. We do not think that the fact that the approval of the agreement with the railroad came so

hard on the heels of the adoption of the regulation means that the approval could not have been intended to implement the regulation; indeed, we do not think it appropriate to explore the subjective understandings of the signators. We also agree with the railroad – this is actually a related point – that the preemptive effect of a safety requirement laid down by the Secretary cannot be challenged in a tort suit by arguing to the court that he made a mistake – that he should have imposed a more stringent requirement, or that he should not have acted before hearing the recommendations of a diagnostic team. To allow that sort of collateral challenge to the Secretary's action would put the railroad in an impossible position. It could hardly be asked to challenge the Secretary's specification of the safety devices required at its grade crossings as too lax, and yet if it did not it would be required by law to comply with the specification, thus exposing itself to suit if a tort plaintiff is free to second-guess the Secretary's specification. It is true that if a regulator exceeds his statutory authority or acts arbitrarily, as distinct from making an ill-judged or uninformed or debatable choice, his regulation will not be given preemptive effect. Fidelity Federal Savings & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153-54, 102 S.Ct. 3014, 3022-23, 73 L.Ed.2d 664 (1982); Ridgway v. Ridgway, 454 U.S. 46, 57, 102 S.Ct. 49, 56, 70 L.Ed.2d 39 (1981); Larsen v. Pacesetter Systems, Inc., 74 Haw. 1, 837 P.2d 1273, 1281 (1992); Toolan v. Trevose Federal Savings & Loan Ass'n, 501 Pa. 477, 462 A.2d 224, 227 (1983). But that is a far cry from anything that could be argued here.

All this does not excuse us from having to *interpret* the agreement, for it is the only evidence of any requirement imposed by the Secretary with respect to the grade crossing at which Shots was injured. We must decide whether, read with the regulation, it constitutes a determination of what warning devices should be required at the thousands of crossings covered by the agreement. If the Secretary has not made a determination – and he has not, unless by approving the agreement – that all these crossings would be adequately protected by reflectorized cross-bucks, then the agreement, viewed as a kind of order or regulation by the Secretary, cannot be thought to have covered the subject matter of safety at Indiana grade crossings. To repeat, the regulation itself, although concerned with safety at all crossings, does not prescribe the safety devices at any; rather, it establishes criteria to which the prescriptions, made later, must conform.

The agreement is limited in scope to "passive" warning devices, a term that excludes gates and flashing lights. 23 C.F.R. §§ 646.204(i), (j). The word "scope" deserves emphasis. The agreement does not state or imply that the thousands of crossings covered by it would be adequately safe if equipped with reflectorized cross-bucks. The point is rather that these are the only form of safety device that the agreement covers. This limitation of scope is reinforced by the fact that the agreement is explicitly limited to providing the "minimum" in passive protections – the minimum being standard reflectorized cross-bucks for crossings, such as the one in question in this case, that lacked even that much in the way of a warning device. Minimum is not a synonym for optimum, or even adequate. We must not forget the

context of the agreement. The State of Indiana had thousands of substandard crossings, and limited funds, even with federal largesse, to bring them all up to the optimal standard of safety. The task was to maximize grade-crossing safety in the state as a whole, subject to a budget constraint, so it was to be expected that adequate safety might be sacrificed at some crossings to enable minimum safety to be achieved at all. So far as can be gathered from the record compiled in the district court, the agreement was a step on the road to adequate safety rather than a determination by the State of Indiana or the federal Secretary of Transportation as to what safety devices would be adequate at each of the thousands of crossings covered by it.

Thus we do not think it can be realistically said, to use the formulation in Easterwood, that "the Secretary has determined the devices to be installed" at these crossings merely because he authorized federal funds to bring them up to minimum standards, utilizing passive warning devices solely. Indeed, it would have been an extraordinary act of irresponsibility for the Secretary of Transportation, by approving the agreement, to preclude tort liability for the railroad's failing to have active warning devices at any of the thousands of crossings covered by the agreement, or otherwise to prevent the state from requiring adequate safety devices at the busiest or most dangerous of these crossings, when no one in the federal government had made a determination that the improvements to be made would bring all the crossings up to a level of safety adequate to satisfy federal standards.

AFFIRMED.